## BRIEF IN SUPPORT OF PETITION

### OPINIONS

One opinion was delivered by the District Court. It was written by then District Judge Elwood Hamilton and filed February 8, 1938. It appears on page 18 of the record and is reported in 22 Fed. Supp. 44. The opinion of the Circuit Court of Appeals (Circuit Judges Simons, Allen and Arant, Judge Allen writing) was filed June 7, 1940, and appears at page 114 of the record. This opinion is as yet unreported.

### THE FACTS

The facts are stated in the petition, page 2. We desire to emphasize the statement that the petitioner is engaged in a strictly private, intrastate business.

### ARGUMENT

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS

#### I

#### IMPORTANCE

The importance of the ruling of the Circuit Court of Appeals with respect to the applicability of Section 4077 to a corporation situated as is the petitioner, is revealed

in the fact that at the time this brief is being prepared there are pending in the Circuit Court of Franklin County, Kentucky, two suits between the petitioner and the taxing authorities of Kentucky relative to the liability of the petitioner for a tax for the year 1937 under Section 4077, and for the years 1938 and 1939 under Section 4077, as amended by the General Assembly of Kentucky in 1938. Doubtless there are corporations other than the petitioner situated as it is, so that it is reasonable to say that the determination of the proper application of Section 4077 is an important question of local law.

The proper and binding interpretation of a state taxing statute is that given by the courts of the state, so long as no federal constitutional question is involved. When a federal decision is probably in conflict with local rulings with respect thereto, we urge that it should be reviewed.

## II

### The Circuit Court's Recognition of a Conflict With Local Decisions

The opinion of the Circuit Court of Appeals recognizes the conflict between its own holding and Kentucky rulings when it says, page 117 of the record:

> "While expressions supporting appellee's contention can be picked out from certain Kentucky holdings which involve ordinary business corporations and hence are not helpful (Cf. Louisville Tobacco Warehouse Company v. Commonwealth, 106 Ky. 165; Commonwealth v. Walsh's Trustee, 133 Ky. 103), in view of the decisions squarely upon this point, and also in view of the history of this provision, we

> think that the conclusion of the District Court was erroneous."

We suggest that the factual situation of the petitioner demonstrates it to be an ordinary business corporation, in that it does not serve the public in any sense and in that it does not have any special or exclusive privilege or any special or exclusive franchise, as we shall show. Hence the Kentucky holdings, cited by the Circuit Court of Appeals as contrary to its decision, which interpret Section 4077 and squarely decide that it does not lay taxes upon all corporations, but only such as perform public service or have or exercise a special or exclusive privilege or a special or exclusive franchise are helpful not only, but also are in direct conflict with the decision of the Circuit Court in this case; because we shall demonstrate that the petitioner has no privilege or franchise which is "special or exclusive."

It will be observed that the Circuit Court of Appeals has based its ruling upon two grounds:

> (a) That the petitioner falls within the specifically enumerated companies in the statute, because the words "pipe line companies" occur in that list. (R. 115);
>
> (b) That the petitioner has a special or exclusive privilege or franchise not allowed by law to natural persons, because the opinion holds that the petitioner is vested with the right of eminent domain, and because it has the franchise or privilege to build pipe lines under county roads and permits to build them under state highways. (R. 118.)

In deciding this case the Circuit Court of Appeals said

> "That appellee (petitioner) falls within the enumerated companies of Section 4077 is plain, as the statute expressly names 'pipe line company' in the first classification of the Section." (R. 115.)

In so holding the Circuit Court necessarily was deciding that the statute applies to every company bearing the name of "pipe line company", regardless of the nature of its business or of the manner in which it uses its physical equipment, and even if it does not serve the public. This conflicts with the holding of the Court of Appeals of Kentucky in

> *Aetna Life Insurance Company v. Coulter, 115 Ky. 787, 801*

where, in discussing Section 4077 it was said:

> "All the 20 named corporations have special or exclusive privileges or franchises not allowed by law to natural persons."

Such privileges or franchises cannot be possessed by "any man or set of men", except in consideration of public service. Section 3 of the state constitution so provides.

At page 798 of the opinion in the Coulter case, the Kentucky court said:

> "In Louisville Tobacco Warehouse Company v. Commonwealth, 106 Ky. 165, the statute was construed and was held not to embrace private trading corporations not having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service. To this conclusion we adhere."

The Circuit Court of Appeals is in conflict with the foregoing when it decides that the petitioner is a "pipe line company" within the meaning of the statute, regardless of whether it has or exercises any special or exclusive privilege or franchise not allowed by law to natural persons, and regardless of whether it performs any public service.

It would not be pretended by any one, we suppose, that the mere denomination of a corporation as a "pipe line company" by its corporate name gives rise to the tax, regardless of its business or property. If that were true, a mere change of corporate name would defeat the tax.

With respect to the basis of the Circuit Court's opinion summarized as "b" above, we should like to say that the conflict between the Circuit Court's opinion and the rulings of the Kentucky Court is apparent, when it is realized that the Circuit Court has failed to grasp the easily demonstrated fact that, under Section 164 of the Kentucky constitution, privileges not allowed by law to natural persons may be granted to any natural person or corporation; but that such privileges cannot be special or exclusive unless they are granted in consideration of public service. Section 3 of the Constitution of Kentucky.

## III

### Section 4077 Imposes a Property Tax Upon an Intangible Value Said to be Added to Tangible Property by its Use in the Public Service

In considering this matter, it is important to realize the nature of the tax provided for by Section 4077, as it has been defined by the local court. The franchise here

taxed is not what is ordinarily meant by the word "franchise." It was said in

*James v. Kentucky Refining Co., 132 Ky. 353, 357,*

> "The franchise spoken of by this statute is not the right to do the thing, but the doing of it. The state does not seek by this section to tax the right to do it. It fixes a value upon the privilege which has been enjoyed, and taxes that value as property of the person who has exercised the privilege. The right to be a corporation is one thing; the fact that the corporation actually engages in a certain business, or enjoys a privilege peculiar to such business, is or may be quite a different thing. The legislative purpose was to classify certain kinds of employment, which upon an examination of the statute will be seen to have been all of a kindred nature—it was the serving of the public in some sense."

Another definition of the franchise value taxed by this statute was given by the Court of Appeals of Kentucky in

*Louisville Tobacco Warehouse Co. v. Commonwealth, 106 Ky. 165, 168,*

as follows:

> "The corporate property sought by this statute to be subjected to taxation may be said to be the added value which the exercise by the corporation of any special or exclusive privilege or franchise not allowed by law to natural persons gives to the tangible property."

## IV

### No Franchise or Privilege Can Constitutionally be "Special of Exclusive" Unless Its Holder is Engaged in Public Service

With these definitions in mind, it seems plain that the Circuit Court of Appeals is in conflict with the Kentucky court in holding that the petitioner's franchise to place a pipe under a county road, or its permit to place a pipe under a state highway, bring it within the purview of the statute, if it can be further demonstrated from the Kentucky opinions that those rights held by the petitioner are not, and cannot be, special or exclusive.

The Circuit Court of Appeals admits in its opinion that the petitioner does not perform any public service. Its recital of the facts, (R. 114) is such an admission. Its specific statement that "no one else may use appellee's pipe line" (R. 119) is such an admission. Hence the Circuit Court of Appeals has gone contrary to Section 3 of the Constitution of Kentucky, and its decision is in conflict with the decisions of the Kentucky court relative thereto.

The pertinent provision of Section 3 is as follows:

> "No grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services."

As an example of the Circuit Court's conflict with this section, we cite this Kentucky case

> *Louisville Railway Co. v. Louisville Fire & L. P. Association, 151 Ky. 644.*

in which the following statement appears at page 648:

> "Coming now to the question of public service. In the section of the Constitution before quoted emphatic expression has been given to the principle that the legislature is without authority to grant to any man or set of men exclusive, separate, public emoluments or privileges except in consideration of public service, and the principle so declared has been rigidly adhered to, as may be seen by an examination of Gordon v. Winchester Building Association, 12 Bush 110; Commonwealth v. Bacon, 13 Bush 210; Kentucky Trust Co. v. Lewis, 82 Ky. 579; Owen County Burley Tobacco Society v. Brumback, 128 Ky. 137; Barbour v. Louisville Board of Trade, 82 Ky. 645."

Again, in the same opinion, at page 649, the Kentucky court made the following emphatic statement, with which the decision of the Circuit Court of Appeals in the present case definitely conflicts

> " . . . . the only ground upon which a legislative declaration, conferring such exclusive or separate benefits or privileges, can rest, is that the grant is in consideration of public service. If this vital consideration is wanting, the legislation must fail."

In that case at page 650, the Court of Appeals of Kentucky said the following:

> "The public service that may entitle certain individuals, including private corporations, to privileges and immunities not enjoyed by the public generally, is a public service that carries with it some measure of public control and supervision, and the right of public control and authority must precede or accompany the grant of the privilege, and be so much a

part of it that the privilege cannot be exercised without incurring the responsibility and liability that attaches to the performances of public duties. In short the beneficiary of every grant of special privileges must be in some degree the servant of the public and subject to the control and authority of some public agency.

"This is the test to which the right to the enjoyment of special privileges by individuals and private corporations must be subjected, and by this standard their right to privileges and immunities not allowed to the general public must be adjudged."

The Circuit Court of Appeals failed completely to realize the fact that the Constitution of Kentucky, as construed by the Court of Appeals, unqualifiedly forbids the grant of a special and exclusive privilege to one not engaged in public service. It does not forbid the grant of a privilege which is not allowed by law to natural persons; that may be granted to one who does not serve the public, just as such privileges have been granted to the petitioner. A natural person does not have the inherent right to introduce a pipe under a county road. He must obtain that right by contract with the county by means of franchise granted under Section 164 of the Constitution. But having obtained it, by no means is he exclusively entitled to introduce pipe under county roads of the county, unless he was given that right in consideration of a public service to be rendered thereby.

## V

### Whether Section 3766b-1 of Kentucky Statutes, Carroll's 1936 Edition Confers the Right of Eminent Domain Upon a Corporation Which is Not Engaged in Public Service

Another conflict between the holding of the Circuit Court of Appeals and the law of Kentucky as enunciated by the Court of Appeals is found when the following portion of the opinion sought to be reviewed is examined (R. 119):

> "Under Section 3766b-1 of Carroll's Kentucky Statutes, appellee is vested with the power of eminent domain. The provision gives that power to all corporations 'organized for the purpose of constructing, maintaining or operating oil or gas well or wells or pipe line or lines for conveying, transporting or delivering oil or gas, or both.' The section declares that the operation of pipe lines conveying oil or gas is a public use. While appellee has never exercised this power, having secured its right of way by contract with private owners, within the plain terms of the section it has a special privilege which is not allowed by law to natural persons."

This statement that the petitioner is vested with the power of eminent domain, conflicts not only with the established law of Kentucky but with the fundamental legal principle recognized everywhere.

As will be seen from an examination of the statute set out at length in the appendix, Section 3766b-1 of the Kentucky Statutes attempts to give to any corporation organized for the purpose of constructing, maintaining or

operating a pipe line for transporting oil or gas power to condemn land for such pipe line, the statute expressly saying, "all such being hereby declared to be a public use." We suggest that the ruling of the Circuit Court of Appeals, quoted above, holding that this petitioner has the right of eminent domain, even though the petitioner is engaged in a private business and does not serve the public in any way, is in conflict with, and diametrically opposed to, the holding of the Court of Appeals in

*Riley v. L. H. & St. L. Ry. Co., 142 Ky. 67, 69,*

where the court said:

> "The only authority for the taking of private property without the consent of the owner is found in sections 13 and 242 of the Constitution, and these sections do not authorize the taking unless the property is to be applied to a public use and will be necessary for that purpose. Private property cannot be taken for private purposes."

In that same case, on page 69, the Court of Appeals said:

> "But however beneficial the construction and operation of this spur track might be to the distillery company, if it was only intended for its use, and it could not and would not be used by the public, the power of eminent domain could not be invoked to authorize the taking of the land of the appellant for the purpose of building a railroad across her property to the distillery."

In spite of this clear and correct statement of constitutional law, the Circuit Court of Appeals has held that

the petitioner is vested with the power of eminent domain, even though it admits that "no one else may use appellee's pipe line."

The ruling of the Circuit Court is in conflict also with thoroughly established general principles universally recognized. For it is well settled that by mere legislative fiat, the General Assembly cannot declare that to be a public use which is strictly private, nor can it by simple declaration transform into a public service business that which is in its essential characteristics a private business. The Supreme Court of the United States has held that legislative pronouncement will not make into a common carrier a facility which is in fact not a common carrier. In the case of

> *Producers Transportation Co. v. Railroad Commission, 251 U. S. 228, 230,*

the Court said:

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of the Commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment." Numerous cases cited.

The facts of our case are even stronger, for the petitioner does not carry oil for any producer nor for any one. As has been said it transports only its own oil.

So, regardless of Section 3766b-1, it is clear from the constitutional provisions of Kentucky and the Riley case above cited that the petitioner has not the power of eminent domain. In holding that it has, the Circuit Court of Appeals has run squarely counter to the law of Kentucky as expressed by its highest court.

## VI

### The Specific Conflict With the Petroleum Exploration Case

The Circuit Court of Appeals has misunderstood and misapplied the decision of the Court of Appeals of Kentucky in the case of *State Tax Commission v. Petroleum Exploration, 253 Ky. 119.* The decision of the Circuit Court in this case is contrary, we think, to the decision of the Petroleum Exploration case. The Circuit Court has picked out and quoted (R. 118) one paragraph from that opinion, without considering the facts, and apparently without considering the opinion as a whole.

In that case, Petroleum Exploration was in much the same situation as is the petitioner here, with one marked and decisive difference, hereafter pointed out, Petroleum Exploration was engaged in transmitting its own gas through its own pipe line a distance of about 63 miles. The line passed near, but not within, the towns of Irvine, Ravenna and Richmond. At those points the gas was sold and delivered at wholesale to Eastern Kentucky Natural Gas Company in which Petroleum Exploration had no financial interest, which in turn sold and distributed the gas to the inhabi-

tants of those towns. The pipe line also extended to the city gate of Lexington, where gas was sold at wholesale by private contract to another retail distribution company in which Petroleum Exploration had no financial interest. Petroleum Exploration did not transmit gas for others and did not sell directly to the public. At first it condemned several tracts of land for its pipe line, but, finally conceiving that it did not have the legal power, it ceased condemnation proceedings, and thereafter obtained its right of way by purchase.

Petroleum Exploration denied that it was engaged in any business which could give rise to any taxable franchise value under the statute and its position in the case above cited may be summarized as follows:

1. Section 4077 applies only to corporations engaged in public service, or making use of some part of the facilities of another corporation engaged in public service, or having some special or exclusive privilege not allowed by law to natural persons, and does not apply to ordinary commercial or private trading corporations.

2. The commonly understood meaning and the technical meaning of "pipe line company", is public carrier pipe line company.

3. That Petroleum Exploration was not a pipe line company within the meaning of the statute because it did not transport gas belonging to others, but transported only its own gas, which it did not sell to the public, but sold by private contract to two companies in which it had no financial interest.

In deciding the case, the Court of Appeals held that

Petroleum Exploration was performing a public service. It said (253 Ky. at page 124):

> "Manifestly the case is not one where appellee is engaged in a private business. That would be true if it merely piped its own gas from its gas fields for its own use or for the sole use of a particular corporation, but that is not the case. Its pipe line is the connecting link between the gas fields and the public. Without this service the gas would not be available to the inhabitants of the four towns. In short, its business is the transportation of gas for ultimate consumption by the public, and, according to the weight of authority, it is performing a public service and has the power of eminent domain, although it does not sell directly to the consumers, but sells to others, who in turn sell and distribute the gas to the public."

The decisive difference between Petroleum Exploration and petitioner is that the product transported by the latter is not furnished to the public immediately nor at all. Natural gas is supplied to the public for consumption as such; crude oil is not.

It will be noted that Petroleum Exploration was held to be subject to the tax, not because it was simply the owner of a pipe line,—but because it was performing a public service. The opinion says at page 125:

> "Whether it would apply to a company engaged in piping its produce for its own use or for the sole use of a private customer is not a matter of concern here. Having come to the conclusion that the facts of the case show the appellee to have been performing a public service, we have no doubt that it is a 'pipe line company' within the meaning and intention of the statute, . . . ."

The only possible inference is, that had the court not come to the conclusion that Petroleum Exploration was performing a public service, it would not have held it to be a "pipe line company" within the meaning of the statute.

So, we urge that the Circuit Court has misinterpreted and misapplied the Petroleum Exploration opinion (R. 118) when it picks out and relies upon the paragraph which it quotes, although the Kentucky court in that case had expressly disclaimed any intention to decide the tax liability of a company in the petitioner's situation. That disclaimer appears in the Petroleum Exploration opinion at page 125 when the court says with respect to the statute:

> "Whether it would apply to a company engaged in piping its produce for its own use or for the sole use of a private customer is not a matter of concern here."

In spite of the paragraph picked out of the Petroleum Exploration opinion by the Circuit Court of Appeals, the real principles enunciated in that case support the petitioner. The Kentucky court defined the tax imposed by Section 4077, on page 125.

> "It is a tax levied upon the intangible values inhering to the business and the added value given to the tangible property .... An intangible estate springs from the vested power of eminent domain, the privilege of public service and other conceivable rights enjoyed by the appellee."

As we have shown, the power of eminent domain arises only when the taking is for public use. It necessarily fol-

lows that the vested power of eminent domain arises from the privilege of public service. The "other conceivable rights" enjoyed by Petroleum Exploration obviously must be comprehended by the statutory phrase "special and exclusive privileges or franchises not allowed by law to natural persons." As we believe we have demonstrated, such special and exclusive privileges arise only from public service.

So, it follows, that the sentence last above quoted from the Petroleum Exploration opinion really boils down to this: "an intangible estate springs from the privilege of public service." Such an estate is the intangible value taxed by Section 4077. Any individual who does not possess it is not reached by the tax. Any corporation which does not possess it is not subject to the tax. And no person or corporation possesses that intangible estate unless the element of public service is present.

## VII

### The Kentucky Opinions Cited by the Circuit Court of Appeals as Sustaining Its Position, Are Contrary to It

The Circuit Court of Appeals quotes as authority for its position *Louisville Tank Line Co. v. Commonwealth, 123 Ky. 81.* (R. 116).

After quoting from the Tank Line Co. case, the opinion of the Circuit Court proceeds as follows:

> "This doctrine was followed in James, Aud., v. Kentucky Refining Co. 132 Ky. 353, 359. In Stoll Oil Refining Co. v. State Tax Commission, 221 Ky.

> 29, a specific attack was made upon the construction of 4077, but the Court of Appeals of Kentucky adhered to its position."

This seems to us to mean that the Circuit Court considered these Kentucky cases to be against the petitioner and that it based its decision largely upon them. Yet, in the James case, which is later than the Tank Line case, the opinion of the Kentucky Court says:

> "The legislative purpose was to classify certain kinds of employment, which upon an examination of the statute will be seen to have been all of a kindred nature—it was the serving of the public in some sense."

The differentiation between those cases and the present case is plain. In each one of them the use of railroad facilities was involved and, when the opinions are studied carefully, it is at once apparent that the real reason underlying the decisions was the utilization of railroad facilities, or the fact that equipment was furnished to a common carrier.

With that undeniable fact in mind, it will be seen that the Kentucky cases cited by the Circuit Court do not support its conclusion. In this case, the factual situation of the petitioner does not include the one vital element, which was the real basis upon which the Court of Appeals of Kentucky held the Louisville Tank Line Company, the Kentucky Refining Company and the Stoll Oil Refining Company subject to the tax,—that is, the use or furnishing of railroad equipment or facilities. The petitioner here does not contribute in any way to the facilities of any common carrier or any public service corpora-

tion. It does not use directly or indirectly, the facilities of any common carrier or any public service corporation.

The Court of Appeals of Kentucky has made with respect to the Tank Line and the James cases the same observation which we are making. In

*Commonwealth v. Louisville Transfer Co., 181 Ky. 305, 309*

concerning the James and Tank line cases, it is said:

> "The cases cited by appellant's counsel in support of its several contentions, viz.: Henderson Bridge Co. v. Commonwealth, 99 Ky. 623; Louisville Tank Line Co. v. Commonwealth, 123 Ky. 84; James, Auditor, v. Kentucky Refining Co., 132 Ky. 357; do not militate against the conclusions we have expressed, as the corporations from which it was sought to collect the franchise tax in these cases were either carriers of freight or passengers by means of railroads, furnishers of equipages for railroads or like corporations engaged actually or incidentally in the railroad carrying business."

In the Louisville Transfer Case, the Kentucky court not only was construing Section 4077, but was pointing out with exactitude the reason upon which its own previous opinions construing that same section had been based.

There is a conflict, we think, when the Circuit Court of Appeals construes certain Kentucky opinions one way, and the court which was the author of those opinions construes them the opposite way.

The construction of the James and Tank Line cases given by the Kentucky court in the Louisville Transfer

case (the reasoning of which applies with equal force to the Stoll case), demonstrates the accuracy of the following statement in District Judge Elwood Hamilton's opinion in this case, found at page 22 of the record:

> "There is no decision of the Kentucky courts on the application of the taxing statute here involved to a corporation operating a pipe line for its own use or that of a private corporation and, in the absence of an interpretation of the statute by the Supreme Court of the state, this court must apply its own interpretation."

In the course of the opinion of the Circuit Court of Appeals (R. 117) reference is made to

> *Providence Banking Co. v. Webster County, 108 Ky. 527.*

The opinion says: "This case is controlling upon this court."

It is interesting to note, however, that the statute has been amended since the Providence Banking case was decided and that banks, trust companies, guarantee and surety companies have been removed from the list of enumerated corporations and those enumerated, if actually engaged in the kind of business named, are purely public service companies.

It is apparent from all of the Kentucky decisions construing Section 4077 that the legislative intent in enumerating certain types of companies simply was to use them as illustrative of companies having or exercising "any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service." That this is true is seen from the following in

*Marion National Bank v. Burton, 121 Ky. 876, 888*:

> "Under the sections noted above, (i. e., 4077 et seq.) corporations not possessing or exercising an exclusive privilege do not pay a franchise tax at all."

A very specific example of the conflict between the opinion of the court below and the Court of Appeals of Kentucky is shown by the comparison which we now give. The court below said with respect to the Providence Banking case (R. 117) that "while the Providence Banking Company exercised no public service and had no special privilege or franchise, it was held taxable under the statute." Yet in the Marion National Bank case, just cited, at page 889 of the opinion, the Kentucky court said that banks and trust companies

> "do possess and exercise exclusive franchises or privileges, that of banking."

The elimination from the statute of banks, trust companies, guarantee and surety companies reduced the specifically enumerated list to a roster of strictly public service corporations, about the nature of which as such there can be no dispute. That elimination, and the consequent restriction of the specific list to public service corporations which are unquestionably such, led the Kentucky court to say in

*Commonwealth v. Walsh's Trustee, 133 Ky. 103, 112*

that the kind of corporation which is subject to taxation under Section 4077, "is that which has or exercises some

special or exclusive privilege or franchise not allowed by law to natural persons, or performing some public service, *many of which are named.*" (Emphasis supplied).

In the opinion of the Circuit Court of Appeals (R. 117) that court refers to the history of Section 4077 as being partly the basis of its decision. In view of the cases which we have just cited, we think it reasonable to contend that the history of the statute is materially helpful in demonstrating that in its present form it is not intended to apply to non-public service activities.

It is quite true, as the Circuit Court said, that the Providence Banking Company case has never been reversed. The amendment of the statute made it unnecessary. The Circuit Court said (R. 117) that the Providence Banking Company decision "states the law of Kentucky that if appellee is one of the enumerated companies, or one of the 'like' companies, it is subject to the tax." The point we seek to make is that the petitioner is one of the enumerated companies or one of the like companies, only if it engages in the service of the public.

The fundamental thing which caused the Circuit Court of Appeals to fall into conflict with the line of cases in Kentucky was its failure to realize that the mere ownership of physical equipment does not give rise to the intangible value taxed by Section 4077. The intangible value is added to the tangible property only when the tangible property is employed in the manner set forth in the statute.

It will be noted that Section 4077 requires the payment to the state of a tax on the "franchise", or intangible value, and the payment of a local tax thereon to the county or other district "wherein its franchise may be exercised." This seems to us to emphasize the point which we seek

to make, that the fair meaning of the Kentucky decisions is that the imposition of the tax is dependent upon the nature of the business conducted or services performed by the companies enumerated, or other companies.

The Providence Banking Company case does not decide the law of Kentucky to be that the petitioner is enumerated in the statute simply because it happens to own physical facilities which could be used in a manner to subject the petitioner to the tax, but which in fact are not so used.

The petitioner easily could become a common carrier of oil, in which event it would immediately be subject to the tax; but until it devotes its property to the public use, it has no liability under this statute. All the Kentucky cases show that it is the use to which the property is put, and not the nature of the property, which produces the added value taxed by Section 4077. In deciding otherwise, the opinion of the Circuit Court of Appeals conflicts with the unbroken thread of the Kentucky decisions.

In closing we should like to point attention to the following statement in the Circuit Court's opinion (R. 119):

> "and the obtaining of permits under sections 1599c-1 and 1599c-2, Carroll's Kentucky Statutes, to construct pipe lines under state highways, gave to appellee special and exclusive privileges within the meaning of Section 4077."

We have been unable to find in the record any pleading or proof that the petitioner obtained such permits under the sections of the Kentucky Statutes referred to by the court below. The conclusion of the Circuit Court of Appeals that the permits were issued under Sections 1599c-1-2 was quite gratuitous.

We earnestly suggest that the Circuit Court of Appeals has decided an important question of local law in a manner definitely in conflict with Kentucky cases which show the true meaning of the statute and its proper application.

Respectfully submitted,

R. Miller Holland,
Arthur D. Kirk,
Wilbur K. Miller,
Owensboro, Kentucky,
Attorneys for Petitioner.

Cary, Miller & Kirk,
Owensboro, Kentucky,
Of Counsel.